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American Civil Liberties Union

Testimony at a Hearing on

H.R. 2934, the “Terrorist Penalties Enhancement Act of 2003,”

Before the

Subcommittee on Crime, Terrorism and Homeland Security

of the

Committee on the Judiciary

of the

House of Representatives

Submitted by
Timothy H. Edgar
Legislative Counsel

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Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, to explain the ACLU’s views on H.R. 2934, the “Terrorist Penalties Enhancement Act of 2003.”

The proposed legislation, which expands the death penalty to acts defined by the USA PATRIOT Act as “terrorism” that are federal crimes punishable by more than one year in prison,¹ is one part of a planned sequel to the USA PATRIOT Act commonly known as “Patriot Act 2.” Congress should not consider such an expansion of the USA PATRIOT Act until it has undertaken comprehensive oversight of the federal government’s use of the Act and its other law enforcement powers.

The bill’s expansion of the federal death penalty would be drastic. In addition to creating twenty-three separate new death penalties in one stroke, the bill also creates an unprecedented “catch-all” death penalty for any federal crime, or any attempt or conspiracy to commit such a crime, that meets the PATRIOT Act’s overbroad definition of terrorism and is punishable by more than one year in prison.

Such a drastic expansion of the death penalty will not make America safer from terrorism. Rather, it will undermine international cooperation against terrorism by further complicating efforts to obtain the cooperation of governments that have abolished the death penalty.

Adding even more death penalties will not deter suicidal, religiously motivated terrorists who have not been deterred by the twenty federal death penalties for crimes of terrorism already on the books (not to mention other federal and state death penalties that may be available) and may instead simply attract new followers to the cause.

The death penalty is in need of reform, not expansion. According to the Death Penalty Information Center, one hundred thirteen prisoners on death row have now been

¹ H.R. 2934 as introduced would have applied to any state or federal crime, but Chairman Coble is sponsoring a substitute amendment that would apply the new death penalty to federal felonies, which are defined as any federal crime punishable by more than one year in prison. 18 U.S.C. § 1.

exonerated. Chronic problems, including inadequate defense counsel and racial disparities, plague the death penalty system in the United States. With twenty death penalties for federal crimes of terrorism already on the books, prosecutors have ample opportunity to seek the death penalty in serious terrorism cases. The expansion of the death penalty potentially to any federal felony creates an opportunity for more arbitrary application of the death penalty.

Congress Should Not Expand the USA PATRIOT Act Without Thorough Review of Its Impact on Civil Liberties

Continued grassroots controversy among Americans of all political persuasions about the impact of post 9/11 government policies on basic civil liberties has slowed the seemingly inexorable momentum of new federal government powers. Conservative organizations, including the American Conservative Union, Free Congress Foundation and the Gun Owners of America, have joined with the ACLU, the American Library Association and many others to argue that America should not sacrifice its liberties in the name of security. More than 291 local resolutions in thirty-nine states, including four state-wide resolutions, have rejected some provisions of the USA PATRIOT Act and other post 9/11 policies that infringe on basic rights and freedoms. Altogether, these communities represent close to 50 million Americans.

As a result, President Bush and Attorney General Ashcroft have not gone forward with a comprehensive sequel to the USA PATRIOT Act – a “Patriot Act 2” that many expected would be introduced last year. Instead, the Administration has endorsed three separate bills expanding federal powers, including this legislation dramatically expanding the federal death penalty.²

Congress should firmly reject any effort by the Administration to add new powers to the USA PATRIOT Act until it has received the cooperation of the Department of Justice in comprehensive oversight of its existing federal anti-terrorism powers. For this reason alone, Congress should reject this legislation.

The Bill’s Sweeping “Catch-All” Death Penalty Would Greatly Exacerbate the Chilling Impact of an Already Overbroad USA PATRIOT Act Definition of “Terrorism”

H.R. 2934 seeks to expand the USA PATRIOT Act to create new death penalties for any federal offense punishable by more than one year, if death results. The bill’s expansion of the federal death penalty would be drastic and unwise.

² The Administration’s “Patriot Act 2” agenda also includes efforts to remove altogether judicial oversight of records searches and a “no-bail” presumption for terror suspects. Patriot Act 2 was not introduced in its original form because of strong bipartisan opposition. However, the Bush Administration has pressed forward with efforts to enact parts of their sequel to the Patriot Act in separate legislation. See Timothy H. Edgar, ACLU Interested Persons Memo Updating the Status of “Pieces of Patriot II” Proposals, Oct. 8, 2003, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14000&c=206>.

First, the bill makes all of the forty-three “Federal crimes of terrorism” listed at 18 U.S.C. § 2332b(g)(5) death-eligible offenses; currently, twenty of these crimes are potentially capital offenses. Second, the bill adds a sweeping “catch-all” death penalty that makes a federal felony a potential capital offense if it meets the broad definitions of “international terrorism” or “domestic terrorism” contained at 18 U.S.C. § 2331. The number of new federal death penalties created by this provision is limited only by the ever-expanding number of federal felonies.

The proposed legislation creates a unique and sweeping “catch-all” death penalty for any federal felony that meets the federal code’s overbroad definitions of terrorism. The “catch-all” death penalty provision would not only dramatically increase the number of federal capital offenses, but would seriously exacerbate the already considerable chilling effect of the USA PATRIOT Act’s “domestic terrorism” definition on political protest groups that use tactics of civil disobedience. This provision would exacerbate the already serious civil liberties problems of the definition of international terrorism and of the similar definition of domestic terrorism enacted by the USA PATRIOT Act.

The USA PATRIOT Act, at section 802, provides that any actions, occurring primarily within the United States, are “domestic terrorism” if they (1) “involve” a violation of state or federal criminal law, (2) “appear to be intended” to influence government policy or a civilian population by “intimidation or coercion” and (3) “involve acts dangerous to human life.” 18 U.S.C. § 2331(5). The federal code’s definition of “international terrorism” is similar, except that the actions must occur primarily outside the United States or “transcend national boundaries” and may involve “violent acts” instead of (or in addition to) “acts dangerous to human life.” 18 U.S.C. § 2331(1).

These definitions of “terrorism” are so broad that many legitimately fear they could cover the civil disobedience activities of diverse protest organizations, including Operation Rescue, Greenpeace, and the anti-globalization movement. Blocking entrances to abortion clinics, for example, could “involve” violations of federal law punishable by more than one year in prison and may certainly “appear to be intended” to influence government policy or a civilian population by “intimidation or coercion.” Blocking clinics under some circumstances involves “acts dangerous to human life” in that such actions could threaten the lives of the protesters (if protesters block traffic, for example) or interfere with the ability of women to get needed medical treatment. The anti-globalization movement is also known for civil disobedience tactics, such as chaining protestors together to block traffic, that could meet the USA PATRIOT Act’s overbroad definition of terrorism.

Because of the chilling effect of this definition on ideologically diverse protest groups, section 802 is one of the provisions of the USA PATRIOT Act that organizations on the left and the right have agreed must be amended to protect civil liberties. Conservative Republican Reps. Butch Otter (ID) and Jeff Flake (AZ) have joined independent Rep. Bernie Sanders (VT) and Democrats such as Rep. John Conyers, Jr. (MI) and Rep. Barney Frank (MA) to introduce H.R. 3352, the Security and Freedom Enhanced (SAFE)

Act of 2003. The SAFE Act now has fifty-five cosponsors and is pending before this Subcommittee.

Section 6 of the SAFE Act reforms the definition of “domestic terrorism” so that it applies only to actions that constitute a “Federal crime of terrorism” under 18 U.S.C. § 2332b(g)(5). The SAFE Act would thus limit “domestic terrorism” to serious federal crimes, going a long way towards reassuring Americans of all political persuasions that the federal government will not treat them as terrorists because they may be involved in civil disobedience. This narrower definition is strongly supported by groups from the right and left, including the American Conservative Union, Free Congress Foundation, Gun Owners of America and the ACLU.

The proposed legislation goes in exactly the opposite direction – not only leaving in place the USA PATRIOT Act’s definition of terrorism but broadening the definition by adding a potential death sentence. Protest organizations have already been significantly chilled by the USA PATRIOT Act’s definition of some civil disobedience tactics as forms of terrorism. A death penalty based on that definition would multiply the chilling effect dramatically.

A few examples help illustrate why such a “catch-all” death penalty would be so inappropriate:

Example 1. A diverse group of American and foreign protestors at an international population control conference chain themselves together in a parking lot entrance to block access to a local reproductive services clinic in violation of the Freedom of Access to Clinic Entrances (FACE) Act of 1994, 18 U.S.C. § 248. A woman seeking treatment because of complications from her abortion cannot gain access and the delay in treatment results in her death from those complications. Under this proposal, a federal prosecutor could seek the death penalty against the protesters for “international terrorism,” because their violations of FACE Act were felonies³ that “transcend[ed] national boundaries” through the involvement of international opponents of abortion, involved “acts dangerous to human life,” appeared to be intended to influence government policy or a civilian population by “intimidation or coercion,” and resulted in death.

Example 2. An organization of gun rights supporters gather at a convention hall to demonstrate against a new federal gun control law that requires all sellers of firearms to be federally licensed dealers and conduct background checks. Some of the demonstrators, saying they want to “send a message to those gun-grabbers in Washington,” hold an illegal “gun show” of the kind the law was enacted to prohibit, committing felony violations of the federal gun control regime at 18 U.S.C. § 922. A mentally unbalanced man purchases one of the firearms and uses it to kill a man. Under this proposal, a federal prosecutor could seek the death

³ A first-time violation of the FACE Act that does not result in bodily injury is a misdemeanor; all other violations are felonies because they carry a maximum sentence of more than one year in prison. 18 U.S.C. § 248(b).

penalty for “domestic terrorism” against those who participated in the illegal gun show because their violations of the 18 U.S.C. § 922 involved “acts dangerous to human life” and appeared to intend to influence government policy by “intimidation or coercion.”

An Drastic and Unwise Expansion of the Federal Death Penalty Would Erase Distinctions Among Terrorism Offenses

Federal law already provides a lengthy and growing list of crimes of terrorism. Forty-three “Federal crimes of terrorism” are listed at 18 U.S.C. § 2332b(g)(5). Twenty of these crimes currently carry a death penalty if death results in the course of the crime. The proposed legislation would provide a death penalty for every crime on the terrorism list, adding twenty-three new death penalties to the federal criminal code in one stroke. The attached chart shows lays out current penalties for all of these crimes, showing which federal crimes would be made death-eligible by this provision of the bill.

Congress should not simply adopt, without examination, the list of “Federal crimes of terrorism” as a proxy for crimes that are serious enough to warrant the death penalty. In listing “Federal crimes of terrorism,” Congress did not choose only the most serious terrorism offenses for which it considered the death penalty to be an appropriate punishment, but also included other crimes that Congress created for the goal of preventing and deterring terrorism, including terrorism financing, material support, and computer-related offenses. Some of these crimes have been defined very broadly to enable the government to prosecute persons whose actions may have some relationship to terrorism but whose involvement is more peripheral than those who commit bombings, hijackings, murders or other terrorist acts that already carry the death penalty.

For example, one crime that currently does not carry the death penalty is the offense of providing “material support” to a designated foreign terrorist organization. This offense was created in 1996 with a maximum sentence of ten years in prison. The USA PATRIOT Act increased the maximum sentence to fifteen years in prison, with a possibility of a life sentence if death results.

There remains substantial controversy about the breadth of the “material support” offense because a conviction requires only that the government show the individual “knowingly” gave assistance to an organization designated as a terrorist organization, even if the assistance was only for the organization’s lawful activities. The government argues that a defendant may be convicted even if he did not know of the designation, believed the assistance would support only charitable activities, and even if the assistance in fact only benefited charitable activities.

One federal appeals court has now ruled the material support statute, as amended by the USA PATRIOT Act, must be construed to require knowledge of the designation or of the organization’s unlawful activities, and that its prohibitions on providing “training” and

“personnel” are void for vagueness.⁴ Adding a death sentence to such a broad statute will only contribute to its constitutional flaws.

Congress was certainly aware that creating the crime of material support of the lawful activities of an organization designated as “terrorist” by the government could be vulnerable to challenge under the First Amendment and the Due Process Clause. While Congress chose to pass the material support statute despite these concerns, by providing a maximum sentence of fifteen years (or a life sentence if death results), Congress indicated it did not believe this crime was as serious as direct participation in terrorist acts for which it provided the death penalty.

While the bill would only permit the death penalty for material support if death results, a prosecutor could be expected to argue that any financial or other contribution to a designated foreign terrorist organization – even for humanitarian activities – is fungible and therefore assisted the organization in committing terrorist acts that resulted in death.

The following examples help illustrate why it is so wildly inappropriate to make the crime of material support a death-eligible offense:

Example 3. Joshua attends a function at a local community center in which he views a graphic film about suicide bombings in Israel. The film praises unofficial “armed resistance” by Jewish militants to Islamic terrorist groups. At the function, Joshua gives money for the “Kahane Chai Relief Fund” for widows of Palestinian attacks. Joshua suspects the charity may be a front, but is angry enough after seeing the film that he does not care. Joshua does not know that Kahane Chai has been designated by the State Department as a foreign terrorist organization.⁵ Under this legislation, Joshua’s actions are not only a crime, but he could now be facing the death penalty.

Example 4. Sean is upset about that some Irish leaders have abandoned the goal of a united Ireland and wants to “send a message” by providing technical assistance to an anti-British website. The website features articles and comments that are strongly nationalist in tone, and Sean has been told the website is run by the Real IRA, a designated foreign terrorist organization. Under this legislation, Sean would not only face criminal charges, but could face the death penalty.

Supporters of the bill may argue that prosecutors can be expected to exercise discretion and will not seek the death penalty except in very egregious cases. While prosecutorial discretion is an important element of the criminal justice system, prosecutors should not have unlimited discretion. The federal criminal code already contains twenty terrorism crimes – and many other crimes not specifically listed as terrorism crimes – that carry the death penalty and cover a broad range of terrorist acts, including bombings, kidnappings,

⁴ *Humanitarian Law Project v. United States Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003).

⁵ The list of foreign terrorist organizations currently numbers 37 and is maintained on the State Department’s website at <http://www.state.gov/s/ct/rls/fs/2003/17067.htm>. See also Jerry Seper, 4 *Jewish Web Sites Deemed “Terrorist,”* Wash. Times, Oct. 11, 2003.

arson, aircraft hijackings and many others. In very serious terrorism cases, federal prosecutors are likely to have at least one, and probably more than one, death-eligible crime with which to charge a defendant. The bill's expansion of the death penalty is likely to affect only the more peripheral cases in which prosecutors would not normally seek the death penalty – but where there may be political pressure to do so because the defendants belong to an unpopular religious, ethnic or political group.

Dramatic Expansion of the Death Penalty Will Hinder International Cooperation Vital to Catching and Imprisoning Terrorists

The radical expansion of the death penalty provided in H.R. 2934 would not aid in preventing terrorism or making America safer. Instead, the legislation is likely to significantly impede international cooperation in combating terrorism by creating new barriers to international legal assistance. Already, many nations that have abolished the death penalty are unwilling to extradite or provide evidence in federal terrorism cases if the death penalty might result from their cooperation.

Other nations have become increasingly critical of the United States for its continued and even expanding use of the death penalty when the international trend has been towards abolition. The exoneration of more than one hundred former inmates of America's death row has not gone unnoticed abroad. Diplomacy concerning the issue of the death penalty has become increasingly tense and complex. The rift between the United States and many of its closest allies is likely to grow even wider as a result of a recent decision of the International Court of Justice concerning the death penalty. The decision strongly rebuked the United States for its disregard of the rights of 51 Mexican nationals on death row to timely consular notification under the Vienna Convention on Consular Relations.⁶

The European Union prohibits the extradition of any criminal suspect facing the death penalty. After the bombing of United States embassies in Africa by Al Qaeda terrorists, Germany only extradited an alleged conspirator to face trial in the United States after negotiating assurances the suspect would not face the death penalty. Many European nations, including the United Kingdom, have restated their opposition to the death penalty after September 11, 2001 and conditioned any extraditions in connection with the global fight against terrorism on similar assurances.⁷

By dramatically expanding the number of death-eligible offenses, the bill would dramatically multiply the number of cases in which prosecutors will have to negotiate special agreements with foreign governments to obtain needed cooperation in obtaining evidence or extraditing suspects.

A dramatic expansion of the death penalty would, according to foreign policy experts, be likely to further impede the cooperation between nations that is absolutely critical to impeding terrorist organizations by arresting and prosecuting their members. Milt

⁶ *Avena and Other Mexican Nationals (Mexico v. United States)*, No. 128 (ICJ Mar. 31, 2004).

⁷ See Andrea Gerlin, *United States May Have to Give Up Death Penalty to Extradite Suspects*, Phila. Inquirer, Oct. 1, 2001.

Bearden, a former CIA station chief in Pakistan and Sudan, warns, “If the U.S. routinely applies the death penalty to cases of international terrorism targeting American citizens, it may limit continued cooperation from the majority of countries most closely involved in combating terrorism.”⁸

Continuing and pronounced racial disparities in the imposition of the death sentence for serious street crimes has contributed to the harsh international criticism of the United States. A dramatic expansion of the death penalty for crimes said to be terror-related – making death-eligible many crimes that would not normally carry a death sentence – would confirm the suspicions of many in the Arab and Muslim world that the United States is creating a separate, and unequal, system of justice for mainly Arab and Muslim defendants.

Major Expansion of Federal Death Penalty Could Have “Reverse Deterrent Effect,” Giving Terrorist Groups New “Martyrs” for the Cause

Finally, the addition of new death penalty offenses to the federal government’s already considerable arsenal of twenty death-eligible terrorism crimes will almost certainly have no deterrent effect on suicidal, religiously-motivated terrorists such as members of Al Qaeda. Well-publicized executions are far more likely to have a perverse “reverse deterrent effect.” Terrorist groups will use the executions as propaganda to attract new followers who will be asked to emulate the “courage” of the “martyr.”

The United States government should not go out of its way to provide terrorists with the gift of publicity – often the most important tactical goal of any terrorist action. Jessica Stern, a terrorism expert and former member of the National Security Council, warns that executions of terrorists can “turn criminals into martyrs, invite retaliatory strikes, and enhance the public relations and fund-raising strategies of our enemies.”⁹

Put simply, the most dangerous terrorists do not fear death – they seek it. Even for those who do not participate in suicide attacks, the risks inherent in terrorist activity are far more significant than the possibility that a death sentence would be imposed on any given terrorist suspect.

While some may argue the death penalty can be used to obtain cooperation of suspects, other countries with more experience in countering terrorist organizations have specifically rejected the death penalty for terrorists. While imprisoning terrorists also carries risks, these nations have determined that the risks of executions are greater, outweighing any potential benefits. For example, the United Kingdom voted to repeal the death penalty for terrorism in Northern Ireland on the basis that executing terrorists only increases violence and puts soldiers and police at greater risk.

Spain similarly rejected the death penalty as counterproductive in its decades-long campaign against the Basque terrorist group ETA. Even as the Israeli government

⁸ Milt Bearden, *Death Penalty Would Hinder Anti-Terrorism*, Op-Ed, Wall Street J., June 4, 2001.

⁹ Jessica Stern, *Execute Terrorists at Our Own Risk*, Op-Ed, N.Y. Times, Feb. 28, 2001.

continues its controversial tactic of targeted killings of terrorist suspects, its judges do not impose the death penalty on terrorists in Israeli custody.

Conclusion

H.R. 2934 is an drastic and unwise expansion of the government's most sobering power – the power to take a life. The federal government already has twenty separate death penalties for crimes of terrorism. Terrorists might also face other federal death penalties, or state crimes that carry the death penalty. While the government has not always obtained a death sentence in every terrorism case where it was sought, the reason was because it could not charge or convict the defendant of a capital offense. For example, in the cases involving the 1998 bombings of United States embassies in Africa, the jury found two defendants guilty of death-eligible crimes, but chose not to impose a death sentence. The bill is thus a classic example of a solution in search of a problem.

H.R. 2934 severely exacerbates the USA PATRIOT Act's definition of "domestic terrorism" – one of the most controversial provisions of the Act. The bill would provide for a possible capital offense for any federal crime that carries more than a year in prison, if the crime "appears to be intended" to influence government policy or a civilian population.

Passage of H.R. 2934 would be seen by many organizations of the right and left – including anti-abortion and gun rights advocates – as a major and troubling expansion of federal power. Congress should not move a major part of the Administration's agenda to expand the USA PATRIOT Act without far more detailed review of the effect of the Act, and other post-9/11 policies, on civil liberties.

H.R. 2934 will rightly be seen, both in the United States and abroad, as another federal infringement on civil liberties that will not make America safer. It will, as a result, increase mistrust, both at home and abroad, even of legitimate anti-terrorism efforts, dividing many Americans from their government and further isolating America in the world. It should be rejected.